United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1321

IN THE

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FOR THE SECOND CIRCUIT

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pgs

THE UNITED STATES OF AMERICA,
Appellee,

vs.

JEROME REYNOLDS and MELVIN JACKSON,
Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, CR 75-175.

BRIEF FOR THE APPELLEE

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JEROME REYNOLDS AND MELVIN JACKSON,

Appellant.

Appeal From a Judgment of Conviction of the United States District Court for the Western District of New York, CR 75-175

BRIEF FOR THE APPELLEE

Issue

Whether the District Court committed error prejudicial to the defendants in admitting into evidence Government Exhibit I, 35 glassine bags of a substance containing heroin.

Preliminary Statement

Appellants, Jerome Reynolds and Melvin Jackson, were convicted on May 14, 1976 after a jury trial before the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York, on a one-count In-

dictment charging that they knowingly, intentionally and unlawfully possessed with intent to distribute approximately 10.67 grams gross weight of a substance containing heroin, a Schedule I controlled substance, as defined in Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1).

On June 14, 1976, Jerome Reynolds was sentenced to a term of ten years, and Melvin Jackson was sentenced to a term of five years. This appeal, filed on June 16, 1976, is taken from the Judgment of Conviction entered in this Court on June 14, 1976.

It should be noted by the Court in order to avoid confusion that the record originally docketed on appeal contained only the transcript of the testimony of the chemist and the Judge's ruling numbered pages one through sixty-six. Subsequent to the Appellants' filing their brief, the Appellee has had the record supplemented by ordering, and having docketed, additional portions of the transcripts. That is the transcript of the direct testimony of Drug Enforcement Agent Kenneth Peterson and Detective Chester Shear, pages numbered one through twenty. These two transcripts will be properly distinguished throughout Appellee's brief.

Statement of Facts[1]

On June 10, 1975 at approximately 2:30 P.M., Special Agent Kenneth B. Peterson of the Drug Enforcement Administration, working in an undercover capacity, phoned defendant Jerome Reynolds to arrange a purchase of heroin (Tr. 4-5). Reynolds stated that he could get about 5 "bundles"

[1] All references to transcripts in the Appellee's Statement of Facts are to the Kenneth B. Peterson and Chester Shear testimony. See last paragraph of Preliminary Statement for further explanation.

of heroin which he would sell to Agent Peterson for $150 per bundle (Tr. 5-6). During the same conversation, the Agent and Reynolds agreed to meet later that day at a garden in a public park to consummate the deal (Tr. 6).

Agent Peterson, accompanied by Detective Chester Shear of the Buffalo Police Department, arrived at the gardens at approximately 4:25 P.M. and parked their car. A few minutes later, the defendants arrived in a 1975 blue Cadillac (Tr. 8) which they parked about 10 feet from the Agent's vehicle. The defendant Reynolds was driving and the defendant Jackson was seated in the passenger seat. Peterson then approached the defendants who remained in the Cadillac and asked Reynolds if he had the heroin with him. Reynolds answered affirmatively, at which time Peterson observed a plastic bag containing heroin on Jackson's lap (Tr. 9). A short conversation followed during which Peterson discovered that Reynolds and Jackson were partners (Tr. 10). Peterson asked if he could see the heroin. Jackson handed the plastic bag to Reynolds who in turn handed it to Peterson. The Agent then counted out 36 or 37 glassine bags contained in five bundles (Tr. 11).

Reynolds then asked Peterson if he had the money. The Agent instructed Reynolds to beep his horn which was Detective Shear's signal to join Agent Peterson. Shear approached the Cadillac and together they placed the defendants under arrest (Tr. 11).

After the arrest, Agent Peterson performed a field test on one of the glassine bags of suspected heroin acquired from the defendants. Upon return to the Buffalo District Office, the Agent weighed, sealed, initialed and locked the contraband overnight in the office vault (Tr. 12). The next day the suspected heroin was sent to the Northeast Regional Laboratory in New York City (Tr. 13).

At trial, Agent Peterson identified what was then marked Government's Exhibit I as the five bundles of heroin given to him by Jerome Reynolds on July 10, 1975. Peterson was able to recognize the exhibit by his initials appearing thereon (Tr. 13-14).

The Statement of Facts prepared by the Appellant regarding the testimony of the chemist and the ruling of the Trial Court as to Government's Exhibit I is sufficient except as may otherwise be noted in the Argument.

ARGUMENT

POINT I. The District Court Did Not Err in Admitting Government's Exhibit I Into Evidence.

Defendants take the position that the District Court committed prejudicial error when it admitted into evidence Government's Exhibit I, some 35 glassine bags containing heroin. Basically, they argue that denial of their motion at trial to exclude the exhibit from evidence was erroneous in light of the Government Chemist's testimony. The chemist testified that he performed tests on the exhibit which indicated conclusively the presence of heroin. However, he was unable to ascertain how many, or which of the 35 glassine bags actually contained heroin, only that at least one of the bags positively did contain heroin. Consequently, the defendants argue that it was to the great prejudice of their case when all 35 glassine bags were admitted into evidence because "it can only be concluded that it was in evidence as being totally heroin . . ." (Appellant's Brief, pages 7, 8).

There is no basis as to how the Appellants arrive at this "inescapable" conclusion. Government's Exhibit I was admitted into evidence not as totally heroin, but rather as a quantity of

off-white powder containing at least some measurable amount of heroin, which is all the Government was required to prove. *United States vs. Cast[illegible]* 418 F.2d 230, 231 (2nd Cir. 1969), *cert. denied,* 397 U.S. 10[illegible] (1970). The record indicates that the latter was clearly the Court's purpose in admitting the disputed exhibit into evidence. In ruling on the defendant's motion to exclude the exhibit from evidence, the Court stated:

> ". . . there is no need to show that there was heroin present in every bag. The evidence does reliably show that in one bag, and we don't know which among the thirty-four or so which were contained in the baggy bag, which Mr. Peterson said he got from Mr. Reynolds on that date, did contain heroin. We don't know which bag, but it is not important. We have a quantity of substance which is contained in a quantity of envelopes, . . . and it is sufficient for the Government's case if there be shown to have been a measurable amount, an amount which does enable the chemist to say definitively that there was heroin present among those various bags. So I am denying both of the defense motions." (Tr. of Court's ruling 62-63).

It would be quite unreasonable to conclude, after the Court so carefully delineated its reasons for denying the defendants' motion, that the exhibit was ultimately admitted into evidence as being totally heroin. The Court's analysis of the issue raised by the defendant and its subsequent ruling on their motion is supported by case law. So long as the jury might find that Government's Exhibit I contained heroin in some amount, it was properly admitted into evidence. *United States vs. Wanton,* 380 F.2d 792, 795 (2nd Cir. 1967); *Jordan vs. United States,* 416 F.2d 338, 344 (9th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

Furthermore, the jury was aware as to the testing processes performed by the chemist and that the powder in all of the 35

bags was not tested. The chemist testified before the jury that only a composite of eight bags was tested. The fact that all thirty-five bags were not individually tested for heroin goes only to the issue of the weight to be given to that evidence and not to its admissibility.

Even if the court were to accept the argument that the exhibit was erroneously admitted into evidence as being totally heroin, or that the jury was unaware that the testing was limited, it is difficult to see how the defendants' case was at all prejudiced. The defendants' singular claim is that by admitting all 35 glassine bags comprising the exhibit, the jury was wrongfully induced to infer from a misstated quantity of controlled substance that the defendants possessed heroin with the intent to distribute it (Appellant's Brief, page 8).

While the amount of controlled substance bears a direct relationship to the validity of inferring an intent to distribute from possession alone, *United States vs. Nocerino*, 474 F.2d 993 (2nd Cir. 1973), *cert. denied*, 412 U.S. 942 (1973); *United States v. Mather*, 465 F.2d 1035 (5th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972); *United States vs. Gonzalez*, 442 F.2d 698 (*en banc*) (2nd Cir. 1971), *cert. denied*, 404 U.S. 845 (1971), neither those cases nor, *United States vs. Blake*, 484 F.2d 50 (8th Cir. 1972), relied upon by the defendants, has any application here. In each of those cases, the Government, of necessity, resorted to inferential proof of intent. Possession with intent to distribute may be inferred from a large quantity of drugs in that it can be inferred that a defendant did not possess so large a quantity for his own personal use. The Government did *not* rely on that inference in the case now before the Court.

Although the Indictment charged the defendants with possession with intent to distribute the proof went beyond

that. It was proven at trial that *there was an actual distribution of the heroin*. Agent Peterson asked for the heroin and Jackson handed it to Reynolds who in turn handed it to the Agent. Further, the proof showed that the whole purpose of the meeting was to sell heroin.

The Government was not relying on the quantity to infer intent to distribute. Intent was shown by the actual distribution and by the conversations leading up to the distribution. It is the most basic logic that if the defendants arranged to meet Agent Peterson to sell him heroin and then gave the heroin to him with the expectation of payment, that they possessed the heroin with the intent to distribute it. Therefore, the actual quantity of heroin contained within the 35 glassine bags is immaterial as long as there was a measurable amount. The defendants cannot demonstrate any prejudice to their case through the admission into evidence of Government's Exhibit I.

Conclusion.

It is respectfully submitted that for all of the above stated reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: United States of America
vs
Jerome Reynolds &
Melvin Jackson

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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United States Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

28th day of September, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19...77